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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

## Creative Power Solutions,

No. CV-21-01559-PHX-DLR

Plaintiff,

## ORDER

V.

Energy Services Group, et al.,

## Defendants.

Before the Court is Plaintiff's Motion to Quash Subpoena Duces Tecum to Messner Reeves LLP. (Doc. 232.) The motion is fully briefed (Docs. 234, 237) and for the reasons set forth herein is granted in part.

On March 7, 2025, Defendants issued a Subpoena Duces Tecum directed to Plaintiff’s former counsel, Messner Reeves. The subpoena sought the production of: (1) all communications between Messner Reeves and Plaintiff relating to the patent assignment submitted to the United States Patent and Trademark Office by Messner Reeves for the four disputed patents (the “Patent Assignment”); (2) all internal communications at Messner Reeves relating to the Patent Assignment; and (3) all documents relating to the Patent Assignment. (*See* Doc. 232 at 12.) In this motion, Plaintiff asks the Court to quash the subpoena in its entirety, arguing that everything sought is protected from disclosure by the attorney-client privilege or is attorney work-product.

*Legal Standards.* The attorney-client privilege protects communications between an

1 attorney and client pertaining to legal advice. *United States v. Ruehle*, 583 F.3d 600, 607  
 2 (9th Cir. 2009). Courts typically employ an eight-part test to determine whether  
 3 the attorney-client privilege applies:

4                     (1) Where legal advice of any kind is sought (2) from a  
 5 professional legal adviser in his capacity as such, (3) the  
 6 communications relating to that purpose, (4) made in  
 7 confidence (5) by the client, (6) are at his instance permanently  
 8 protected (7) from disclosure by himself or by the legal adviser,  
 9 (8) unless the protection be waived.

10                 *Id.* (quotation and citation omitted). The attorney-client privilege is strictly construed. *Id.*

11                 The attorney work-product privilege is a qualified privilege protecting “documents  
 12 and tangible things” prepared by a party or its attorney in anticipation of litigation or trial.  
 13 *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Ariz.*, 881 F.2d 1486, 1494 (9th Cir. 1989);  
 14 Fed. R. Civ. P. 26(b)(3). “[A] party may not discover documents and tangible things that  
 15 are prepared in anticipation of litigation or for trial by or for another party or its  
 16 representative (including the other party’s attorney, consultant, surety, indemnitor, insurer,  
 17 or agent).” Fed. R. Civ. P. 26(b)(3)(A). If the documents were created for a dual purpose,  
 18 that is for litigation and for another non-litigation related purpose, it does not matter  
 19 whether litigation was a primary or secondary motive behind the creation of a document.  
 20 Courts must consider “the totality of the circumstances and determine whether the  
 21 document was created because of anticipated litigation and would not have been created in  
 22 substantially similar form but for the prospect of litigation.” *United States v. Richey*, 632  
 23 F.3d 559, 568 (9th Cir. 2011) (quotation and citation omitted). The party claiming work-  
 24 product protection bears the burden of proving that the work-product privilege applies. *Id.*  
 25 at 566.

26                 Item 1. Defendants argue that because Plaintiff claims it did not authorize Messner  
 27 Reeves to submit the Patent Assignment, there must not be any attorney-client  
 28 communications relating to the Patent Applications. Because there are no attorney-client  
 29 communications, there can be no attorney-client privilege and therefore all  
 30 communications between Messner Reeves and Plaintiff relating to the Patent Assignment

1 are discoverable. The Court disagrees with this circular reasoning.

2 If Plaintiff had no communications with Messner Reeves relating to the Patent  
3 Assignment, then there would be nothing for Messner Reeves to produce in response to  
4 item 1 in the subpoena. If, on the other hand, Plaintiff communicated with Messner Reeves  
5 about the Patent Applications, then those communications would be classic attorney-client  
6 privileged communications. The same would be true for miscommunications—which is  
7 what appears to have happened here—between clients seeking legal advice and their  
8 attorneys. The purpose of the attorney-client privilege is to encourage full and frank  
9 communications between attorneys and their clients, thereby promoting broader public  
10 interests in the observance of the administration of justice. *Upjohn Co. v. United States*,  
11 449 U.S. 383, 389 (1981). Should missteps in communications open the door to discovery,  
12 the purpose of encouraging full and frank disclosure would be undermined.

13 Defendants alternatively argue that, even if the privilege exists, Messner Reeves’  
14 submission of the Patent Assignment to United States Patent and Trademark Office without  
15 Plaintiff’s authorization supplies a factual basis to support application of the crime-fraud  
16 exception. The declaration and signature page for the Patent Assignment requires the user  
17 to acknowledge the accuracy of its representations and that submitting false information is  
18 a misrepresentation to the federal government. Defendants argue that, before ruling out  
19 application of the crime-fraud exception, the Court should perform an in-camera inspection  
20 of these communications.

21 The Court finds Defendants’ crime-fraud exception arguments too thin and  
22 speculative to justify piercing the attorney-client privilege or submission of any potentially  
23 responsive communications for in-camera review. Plaintiff’s motion to quash is granted as  
24 to item 1 in the subpoena.

25 *Item 2.* Plaintiff argues that the materials sought in items 2 of the subpoena are  
26 protected by the work-product privilege. But neither the motion nor the reply show that the  
27 material requested was prepared in anticipation of litigation or for trial. The party claiming  
28 work-product protection bears the burden of proving that the work-product privilege

1 applies. Plaintiff has failed to meet that burden, so its motion to quash is denied as to item  
2 in the subpoena.

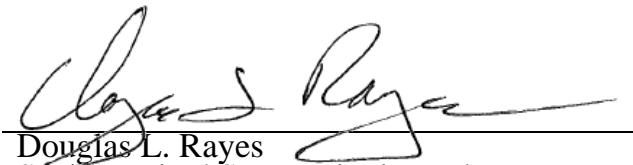
3       *Item 3.* Plaintiff objects in its reply that the documents sought by item 3 in the  
4 subpoena are publicly available, and that the request seeks to have Meesner Reeves open  
5 its file to Defendants. This argument appears to be inconsistent. If these documents are  
6 publicly available, then the Court does not understand how providing those publicly  
7 available documents would amount to anyone opening its file. Plaintiff argues that the  
8 request subjects it to an undue burden because the documents are publicly available.  
9 However, Plaintiff does not explain or describe what the burden is. Showing an  
10 unreasonable burden rests with the party resisting the discovery, and Plaintiff has not made  
11 that showing. Plaintiff's motion to quash is denied as to item 3 in the subpoena.

12       Given this mixed ruling, Plaintiff's request for attorney fees is denied.

13       **IT IS ORDERED** that Plaintiff's Motion to Quash Subpoena Duces Tecum to  
14 Messner Reeves LLP (Doc. 232) is **GRANTED IN PART** and **DENIED IN PART** as  
15 explained herein.

16       Dated this 12th day of May, 2025.

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Douglas L. Rayes  
Senior United States District Judge